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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF NEVADA
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12 REO BOREN,) 3:09-cv-00731-HDM-WGC
13)
14 Plaintiff,)
15 vs.) ORDER
16)
17 BARRY, BYBEE, BRACKBILL,)
18 CARRASCO, COLEMAN, COSTNER,)
19 HOLLINGSWORTH, JACOBY, KIRCHEN,)
MARTIN, PEREZ, PERKINS, RAMSEY,)
ROMERO, SAUNDERS, SCHMIDT, SMIT,)
and JOHN DOES,)
Defendants.)
_____)

20 The court has considered the report and recommendation of the
21 United States Magistrate Judge (#134) filed on July 9, 2012, in
22 which the magistrate judge recommends granting the defendants'
23 motion for summary judgment and giving the plaintiff notice of
24 intent to dismiss the unserved defendants. No objections to the
25 report and recommendation have been filed, and the time for doing
26 so has expired.

27 The court has considered the pleadings and memoranda of the
28 parties and other relevant matters of record and has made a review

1 and determination in accordance with the requirements of 28 U.S.C.
2 § 636 and applicable case law, and the court hereby accepts and
3 adopts in part and rejects in part the report and recommendation of
4 the United States Magistrate Judge (#134).

5 As an initial note, plaintiff's opposition and supplemental
6 opposition cite eleven exhibits (including one group of exhibits),
7 but not all of the exhibits are attached. The magistrate judge
8 declined to consider those exhibits that had not been attached to
9 plaintiff's oppositions or identified by location. The group of
10 exhibits - "defendants exhibits 1 thru 19" - is not germane to any
11 claims remaining in this action. However, the four other,
12 unattached exhibits - the statements written by Gray, Stradley,
13 Parks, and Shea - do touch upon plaintiff's claims. All four
14 exhibits were attached not only to plaintiff's second amended
15 complaint but also to defendants' reply. The court therefore
16 considers all exhibits cited by plaintiff in opposition to summary
17 judgment, including those that were not attached to the
18 oppositions.

19 The court adopts and accepts the report and recommendation
20 except with respect to plaintiff's excessive force claim stemming
21 from the July 23, 2009, incident. As to that claim, the court
22 finds there is sufficient evidence in the record to create a
23 genuine issue of material fact, and summary judgment on that claim
24 must therefore be denied.

25 As to the July 23, 2009, excessive force claim, the magistrate
26 judge recommended granting summary judgment on the grounds that the
27 plaintiff relied only on the conclusory allegations of his
28 complaint and did not produce any evidence. However, Thomas Shea

1 states in a letter that on July 23, 2009, he observed the
2 following:

3 [W]hile walking Mr. Boren just past the slider door and
4 to the stairs, the c/o's all of a sudden dropped Mr.
5 Boren right there on the tier. His head hit the ground
6 with a horrific thud and while completely shackled, hands
7 behind the back and feet, one of the c/os was doing his
8 best to contort Mr. Boren's wrist & arms, while in cuffs,
9 face down on the ground[.] I could also see the c/o
10 contorting Mr. Boren[']s arms, with elbow and forearm on
11 the back of his neck, the c/o was kneeling Mr. Boren in
12 the face for several moments until CERT finally arrived.
13 Mr. Boren showed no reluctance, there was no resistance
14 or defiance. . . .

15 (Pl. Sec. Am. Compl. Ex. 2 (Shea Letter)).¹ In addition, plaintiff
16 asserts in his complaint that he was taken to the floor while his
17 arms and legs were shackled after he made a comment about
18 Hollingsworth's hair pattern. If believed by the jury, these
19 allegations could support an inference and finding that
20 Hollingsworth was acting in response to plaintiff's comments, and
21 not to any aggressive behavior by the plaintiff, and that he
22 therefore used force maliciously and sadistically for the purpose
23 of causing harm. While the court recognizes that Hollingsworth has
24 provided a different version of events,² the plaintiff has
25 presented sufficient evidence to create a genuine issue of material
26 fact as to whether Hollingsworth employed excessive force on July
27 23, 2009. Construing all evidence in favor of the plaintiff, as
28 the court is required to do at this stage of the proceedings,

25 ¹ The declaration of Seville Parks also states that he has "personal
26 knowledge" that plaintiff was taken to the floor in full restraints for "no
27 reason whatsoever," and that plaintiff did not attempt to harm or strike the
28 defendants during the incident. (Pl. Sec. Am. Compl. Ex. 4). However, it
is unclear whether Parks actually observed the incident.

² Defendants have included a video associated with this claim, but it
does not show the actual incident, only the aftermath.

1 summary judgment must therefore be denied on that claim.³

2 The remainder of the magistrate judge's report and
3 recommendation should be affirmed even if the court considers the
4 evidence the magistrate judge declined to consider.

5 Much of John Gray's declaration is not relevant to plaintiff's
6 claims, but it does contain assertions that he personally observed
7 plaintiff being denied meals, that defendant Bybee had once lied
8 about a specific incident of plaintiff throwing his tray of food,
9 and that plaintiff often told Gray how hungry he was. (Pl. 2d Am.
10 Compl. Ex. 3 (Gray Decl.)). However, Gray does not state that
11 plaintiff was refused meals when he asked for them or when he
12 complied with distribution requirements. In fact, the evidence in
13 the record clearly demonstrates that the only times plaintiff did
14 not receive meals was when he either refused them or refused to
15 comply with meal distribution orders and regulations. Further, the
16 evidence shows that plaintiff regularly purchased food from the
17 canteen, and that he was doing so because he did not want to eat
18 the prison food. (See Def. Mot. Summ. J. Exs. C(h) & C(i)
19 (plaintiff's grievances complaining about restricted access to the
20 canteen)). A mere scintilla of evidence is insufficient to create
21 a genuine issue of material fact on plaintiff's claim that he was
22 denied meals. See *British Airways Bd. v. Boeing Co.*, 585 F.2d 946,
23 952 (9th Cir. 1978). The magistrate judge therefore correctly
24 concluded that summary judgment should be granted on plaintiff's
25

26 ³ While defendants' motion for summary judgment broadly asserts
27 qualified immunity, the discussion is limited to plaintiff's claims for
28 deliberate indifference and does not address plaintiff's claims based on
excessive force. (See Def. Mot. Summ. J. 24-25). Accordingly,
Hollingsworth has not raised qualified immunity in defense of this claim.

1 claim of deliberate indifference based on the deprivation of meals.

2 Mark Stradley's declaration relates only to the alleged use of
3 excessive force on November 6, 2008. (Pl. 2d Am. Compl. Ex. 1
4 (Stradley Decl.)). Because the sole defendant named in connection
5 with this claim has already been dismissed for failure to timely
6 serve, this claim may not proceed regardless of what Stradley's
7 declaration says.

8 Finally, Seville Parks' affidavit does not provide any support
9 to plaintiff's claims.

10 In accordance with the foregoing, the report and
11 recommendation of the United States Magistrate Judge is adopted in
12 part and rejected in part. The defendants' motion for summary
13 judgment is **DENIED** as to plaintiff's July 23, 2009, excessive force
14 claim against Hollingsworth. Plaintiff's claim based on the
15 November 6, 2008, incident, which named only defendant "Ringney,"
16 is dismissed without prejudice. The motion is **GRANTED** in all other
17 respects. Accordingly, the claims against defendants Barry,
18 Brackbill, Bybee, Carrasco, Coleman, Costner, Kirchen, Martin,
19 Perez, Ramsey, Romero, Saunders, Schmidt, and Smit, and all claims
20 against Hollingsworth except for the claim of excessive force based
21 on the July 23, 2009 incident, are dismissed with prejudice. The
22 court will give notice of intent to dismiss the unserved defendants
23 without prejudice in a separate order.

24 **IT IS SO ORDERED.**

25 DATED: This 31st day of August, 2012.

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28 UNITED STATES DISTRICT JUDGE